IN THE HIGH COURT OF JUDICATURE AT BOMBAY

O. O. C. J.

WRIT PETITION NO.564 OF 2005

H. Jayarama Shetty. ...Petitioner.

Versus

The Sangli Bank Ltd. ...Respondents.

.....

Mr. P.M. Palshikar for the Petitioner.

Mr. J.P. Cama i/b.Sanjay Udeshi & Co. for the Respondent.

.....

CORAM : DR. D.Y. CHANDRACHUD, J.

March 11, 2005.

ORAL JUDGMENT:

I

The Central Regional Labour Commissioner acting as Appellate Authority under the Payment of Gratuity Act, 1972, allowed

an appeal against an order of the Controlling Authority. As a result of the decision of the Appellate Authority, the claim of the Petitioner for the payment of gratuity stands dismissed. The Appellate Authority has held that (i) Inasmuch as the Petitioner had been posted at Belgaum in the State of Karnataka, prior to an order transferring him to Sangli, the Adjudicating Authority in Maharashtra would have no jurisdiction; (ii) The claim for the payment of gratuity is barred by limitation; and (iii) Though the Petitioner had resigned from service and there was no termination of his services for any misconduct causing damage or loss to, or the destruction of the property belonging to the employer, the forfeiture of gratuity was justified. For the reasons indicated in the judgment hereinafter, I have come to the conclusion that the order passed by the Appellate Authority is unsustainable and that the petition has to be allowed.

II

2. The Petitioner joined the Respondent which is a Scheduled Bank, on 28th May 1991. On 3rd May 1994, a notice to show cause

was issued to the Petitioner to explain certain irregularities which had taken place in the accounts of a constituent of the Bank a decade earlier, in 1984 when the Petitioner was working at the Bangalore Branch. The Petitioner submitted his reply on 24th June 1994. No chargesheet was issued to the Petitioner, nor was any disciplinary proceeding convened in respect of the subject matter of the notice of the Bank. On 12th May 1995, the Petitioner was transferred from the Branch of the Bank in Belgaum in the State of Karnataka to the Head Office at Sangli. On 3rd June 1995, the Petitioner was relieved from the Belgaum Branch. The Petitioner tendered his resignation from service on 17th September 1995 which was accepted by the Bank. On 7th August 1997, the Respondent while responding to a request by the Petitioner for the payment of his terminal benefits informed the Petitioner that they had been adjusted against the dues allegedly payable by the Petitioner to the Bank. Of the amount of gratuity payable to the Petitioner, an amount of Rs.1,06,440/- was stated to have been adjusted on account of the recovery of dues in the account of a constituent of the Bank in respect whereof, a show cause notice

had been issued to the Petitioner earlier on 3rd May 1994. The Petitioner addressed representations on 5th September 1997, 29th January 1998 and 21st November 1998. These not having elicited any response, the Petitioner moved the Controlling Authority under the Payment of Gratuity Act, 1972 on 15th February 2002 for an order directing the Respondent to pay the gratuity to which the Petitioner was entitled upon the cessation of his service. The Respondent filed a reply and contested the claim of the Petitioner.

3. The application filed by the Petitioner before the Controlling Authority at Pune, was, the Court is informed, transferred by that authority to its counterpart at Mumbai. By an order dated 31st October 2003, the Controlling Authority allowed the application and directed the Respondent to pay an amount of Rs.1,17,669/- together with the statutorily prescribed interest of 10% p.a. from 17th September 1995 till the date of payment. The Bank carried the matter in appeal. The Appellate Authority allowed the appeal on 27th September 2004. The Appellate Authority held that (i) The Controlling Authority in the

State of Maharashtra would have no jurisdiction to entertain the application since the cause of action had arisen at Belgaum in the State of Karnataka where the alleged loss is stated to have been caused; (ii) The application which was filed before the Controlling Authority on 15th February 2002 was barred by limitation, the cause of action having arisen on 17th December 1995, and though under Rule 7 the authority had the jurisdiction to condone the delay for sufficient reasons, there was no application for the condonation of delay; and (iii) On merits, the loss which has been suffered by the Bank was quantified and communicated in the show cause notice issued by the Respondent and if the Petitioner had any grievance, he ought to have challenged the decision of the Bank before the appropriate authority. The correctness of each of these grounds which have weighed with the Appellate Authority has been challenged on behalf of the Petitioner whereas on behalf of the Respondent submissions have been made to sustain the order of the Appellate Authority. The tenability of the submissions urged on either side, will fall for consideration when each of the three findings of the Appellate

Authority is taken up for consideration seriatim.

4. The first issue on which the Appellate Authority has held against the Petitioner is that the Controlling Authority in the State of Maharashtra did not have jurisdiction to entertain the claim for the payment of gratuity for the reason that the cause of action arose at Belgaum where the loss was alleged to have been caused by the Petitioner at the Branch office of the Bank. The facts which have been adverted to in the earlier part of this order would show that the Petitioner joined the Bank, which has its Head Office at Sangli, in Maharashtra on 20th May 1991. Thereafter, during the course of his tenure, as the evidence would show, the Petitioner worked in several branches of the Bank in the Mumbai area for over seven years. The Petitioner was transferred on 12th May 1995 from the branch at Belgaum to Sangli and he was relieved at Belgaum on 13th June 1995. The Petitioner tendered his resignation on 17th September 1995 from his residential address at Virar to the Chief Manager in the Inspection Department of the Bank in the Head Office at Sangli. The

resignation was accepted in Sangli. The Petitioner submitted his representation to the Bank for releasing his terminal benefits to the authorities at the Head Office at Sangli and the letter dated 7th August 1997 of the Chief Personnel Manager of the Bank refusing his request was forwarded from Sangli and received by the Petitioner at his address at Mumbai. On these facts, there can be absolutely no doubt about the position that the claim of the Petitioner for the release of gratuity arose upon the cessation of his service as an officer of the Bank consequent upon his resignation on 17th September 1995. The resignation was submitted to the Bank at Sangli and was accepted by the Bank. The Appellate Authority in the face of these facts purported to hold that the Controlling Authority had no jurisdiction for the specious reason that the loss which had allegedly been caused to the Bank was in Belgaum. The reasons which weighed with the Appellate Authority require only to be stated to be rejected. The foundation of the claim before the Controlling Authority was for the payment of gratuity on cessation of service. The loss which the Bank sought to set up in defence as a ground for forfeiture of gratuity cannot by any

stretch of imagination divest the Controlling Authority in the State of Maharashtra of its jurisdiction to adjudicate the claim. The Appellate Authority constituted under the Payment Gratuity Act, 1972, is expected to discharge a wholesome jurisdiction to facilitate the adjudication of disputes which arise under a social welfare legislation. The Court is constrained to observe that a hyper technical approach – an erroneous approach at that – has been allowed by the Appellate Authority to deflect the course of justice, for a completely untenable reason. It may be noted that the only submission which has been urged before this Court under this head is that the Controlling Authority in Maharashtra had no jurisdiction. The submission is rejected for the aforesaid reasons.

5. The second reason which weighed with the Appellate Authority was that the claim of the Petitioner for payment of gratuity was barred by limitation. The Petitioner submitted in his application that the breach on the part of the employer was of a continuous and recurring nature. The Petitioner, however, submitted that if the

authority came to the conclusion that there was a delay, he would crave leave to file a separate application for the condonation. Counsel for the Petitioner has made a statement before the Court on instructions that there was no separate application for condonation.

6. Section 4 of the Payment of Gratuity Act, 1972 provides that gratuity shall be payable to an employee on the termination of his employment after he has rendered continuous service for not less than five years, on superannuation or, as the case may be, on retirement, resignation, death or disablement. Sub-section (1) of Section 7 provides that a person who is eligible for the payment of gratuity shall send a written application to the employer, within such time and in such form, as may be prescribed, for the payment of gratuity. Sub-section (2), however, lays down that irrespective of whether an application as provided in sub-section (1) has been made or not, the employer shall as soon as gratuity becomes payable, determine the amount of gratuity and give a notice in writing to the person to whom the gratuity is payable and to the Controlling

Authority specifying the amount of gratuity so determined. Sub-sections (3) and (3A) of Section 7 were substituted by Amending Act 22 of 1987 with effect from 1st October 1987. Sub-section (3) provides that the employer shall arrange to pay the amount of gratuity within thirty days from the date on which it becomes payable to the person to whom gratuity is payable. Sub-section (3A) stipulates that if the amount of gratuity that is payable is not paid by the employer as specified in sub-section (3), the employer shall pay simple interest at such rate, not exceeding the rate notified by the Central Government from time to time for repayment of long term deposits. No interest is, however, payable if the delay in payment is due to the fault of the employee and the employer has obtained permission in writing from the Controlling Authority for delayed payment on that ground. Payment of interest on delayed payment of gratuity is the statutory norm and even if delay is due to the employee, the employer has to obtain permission of the Controlling Authority in writing on this ground without which gratuity must carry statutory interest. Sub-section (4)(a) then provides that if there is any dispute as to the amount of gratuity

payable to an employee under the Act, or as to the admissibility of any claim of, or in relation to, an employee for payment of gratuity or as to the person entitled to receive the gratuity, the employer must deposit with the Controlling Authority such amount as he admits to be payable. Sub-section (4)(b) provides that upon there being a dispute with regard to any matter specified in clause (4)(a), the employer or employee or any other person raising the dispute may make an application to the Controlling Authority for deciding the dispute. The Controlling Authority has thereupon been empowered to adjudicate upon the dispute.

7. These provisions of the Payment of Gratuity Act, 1972 provide a statutory elucidation of the nature of gratuity as a terminal benefit. Under Section 4 of the Act, payment of gratuity to an employee is a mandate of the statute, on the termination of employment after continuous service for not less than five years. This mandate is subject to the limited exception which is carved out in sub-section (6) of Section 4 to which a reference would be made

shortly hereafter. The employer is under a mandate and an obligation to determine the amount of gratuity that is payable as soon as gratuity becomes payable. The employer is under an obligation to arrange for the payment of the amount of gratuity within 30 days from the date on which it becomes payable to the person to whom is payable. After the amendment of 1987, a statutory provision has been made for the payment of interest. The employer can avoid that obligation to pay interest only if the delay in payment is due to a fault of the employee and if employer is granted permission in writing by the Controlling Authority for the delayed payment on that ground. These provisions emphasise that the determination of the amount and the payment of gratuity is the obligation of the employer. The employer has to make a determination of the gratuity which is payable whether or not an application has been made by the employee. The employer has to arrange payment.

8. These provisions have been interpreted by the Supreme Court in **H. Gangahanume Gowda v. Karnataka Agro Industries**

Corpn Ltd., 2003 I CLR 705, where the Court held as follows:

> "From the provisions made in section 7, a clear command can be seen mandating the employer to pay the gratuity within the specified time and to pay interest on the delayed payment of gratuity. No discretion is available to exempt or relieve the employer from payment of gratuity with or without interest as the case may be. ... Payment of gratuity with or without interest as the case may be does not lie in the domain of discretion but it is a statutory compulsion. Specific benefits expressly given in a social beneficial legislation cannot be ordinarily denied." (emphasis supplied)

The Supreme Court held that in view of the clear mandate of Section 7, no residual discretion vested in the High Court to relieve the obligation imposed on the employer of paying interest on account of the delayed payment of gratuity.

9. On behalf of the Respondent, however, reliance was sought to be placed on the rules framed under the Payment of Gratuity Act, 1972. These Rules, it must be noted at the outset, were framed prior to the Amending Acts of 1984 and 1987. The Payment of Gratuity Act, 1972, it may be noted, has made no provision for a specified period for the submission of an application to the Controlling Authority in Section 7(4)(b) of the Act. As contradistinguished from this, Section 7(7) provides for a specific period of limitation of sixty days for preferring an appeal to the appropriate Government against the decision of the Controlling Authority under Section 7(4). In **Sitaram vs. M. N. Nagrashana** (AIR 1960 S.C. 260) the Supreme Court considered Section 10 of the Workmen's Compensation Act which provided a period of limitation to make a claim for compensation to the Commissioner but empowered the latter to condone delay for sufficient cause. This provision of the Act was held by the Supreme Court to be similar to Section 5 of the Limitation Act and the Court held that the explanation must cover the whole period of delay. In **Gurunath Vithal Tamse v. National Textile**

Corporation, 2002 I CLR 809 this Court held that significantly, the legislature had advisedly not specified any particular period of limitation for moving the Controlling Authority under the Payment of Gratuity Act, 1972. But the submission before the Court now on behalf of the the Respondent, is that the limitation which has been provided for in Rules 7 and 10 of the Rules framed under the Payment of Gratuity Act, 1972 was not brought to the attention of the Court in that case. Before dealing with this submission on first principle, it would be necessary to note that at least three High Courts have had occasion to consider the question. The Delhi High Court, in **M. C. D. v. Nand Kishore,** 2003 (97) FLR 158, dealt with the submission that the Controlling Authority had not taken into consideration the delay of the employee in filing an application under the Payment of Gratuity Act, 1972. The Delhi High Court held that "the grievance of the appellant is misconceived as the non-payment of gratuity due to the Respondent was a continuing wrong and there was no question of any delay in approaching the Controlling Authority. (emphasis supplied). A Learned Single Judge of the Kerala High

Court in **Neelakandan v. State of Kerala,** 2001 II CLR 448 adverted to the provisions of Section 7 of the Act as amended and held that while Rule 7 of the Gratuity Rules provides that an application be filed within a prescribed time, these provisions under the Rules "cannot of course, be taken as over reaching the provision of Section 7(2) of the Act". The Court held that perhaps the impact of the Amending Acts of 1984 and 1987 had not been taken notice of by the rule making body. Upon the amendment of Section 7, it has now unambiguously been laid down that an employer has a duty to pay gratuity whether or not an application is filed. The Payment of Gratuity Act is a piece of beneficial legislation and a liberal interpretation would have to be adopted since an employee, it was held, may not at times be aware of his rights. The Act imposes an obligation on the employer and it would not be open to the employer to benefit from a delay in making an application for the payment of gratuity. The Karnataka High Court in **General Secretary, Vokkaligara Sangha, Bangalore v. R. Chandramouli,** 2002 II CLR 1070 noted that Rule 7(5) permits the entertainment of the

applications for payment of gratuity after the expiry of the period specified and claim shall not be invalid merely because the claimant failed to present the application within the specified period.

10. The Rules framed under the Payment of Gratuity Act, 1972 provide for two separate periods of time in relation to the making of an application. The first under Rule 7 is an application to the employer within 30 days from the date on which gratuity becomes payable. Rule 7(5), however, provides that an application for payment of gratuity filed after the expiry of the period specified shall also be entertained by the employer if the applicant adduces sufficient cause for delay and no claim for gratuity shall be invalid merely because the claimant failed to present his application within the specified period. This must be in a juxtaposed with Section 7(2) which requires the employer to make a determination of gratuity payable and to furnish a notice to the employee and to the Controlling Authority as soon as gratuity becomes payable whether or not an application under Section 7(1) has been made. Clearly therefore, the employer cannot set up

limitation as a defence on the ground that the application to him was not presented within thirty days. The clear answer to such a defence, if it is set up is that the employer is obliged to determine and make arrangement to pay gratuity whether or not an application is made. The second time period that is prescribed is under Rule 10. Rule 10 inter alia provides a period of 90 days for making an application before the Controlling Authority upon the employer failing to issue a notice as required under Rule 8 upon the receipt of an application from the employee under Rule 7. The delay under Rule 10 can be condoned by the Controlling Authority on sufficient cause being shown.

11. The rules which were framed in 1972 must be read in a manner which is consistent with the statutory provisions of Section 7 particularly after the amendments that were introduced by Amending Act 25 of 1984 (with effect from 1st April 1984) and by Amending Act 22 of 1987 (with effect from 1st October 1987). The provisions of Section 7 emphasise that the obligation is that of the employer to

determine and to make arrangements for the payment of gratuity and upon his failure to do so, to pay interest at the rate which is statutorily prescribed. Even if the period that is prescribed in the Rules is taken into consideration, the Rules themselves lay down that the delay on the part of the employer, if any, can be condoned if sufficient cause is shown. A breach of the employer to comply with his obligation under section 7 provides a recurring and continuous cause of action. The Act is a piece of social welfare legislation and the employer cannot be permitted by reason of his own default in complying with his obligation to defeat the just entitlement of the employee. Finally, it may be noted that the employer has to determine and pay gratuity whether or not an application is filed to him. The filing of an application before the employer is not a condition precedent. Rule 7 makes procedural provisions for such an application. On receipt of an application under Rule 7, the employer has to issue a notice under Rule 8 either admitting the claim or to specify the reasons why he holds the claim inadmissible. It is thereafter that time is prescribed in Rule 10 for an application to the Controlling Authority. The making of an application

under Rule 7 therefore invokes a chain of events in Rules 8 and 10. Once the making of an application to the employer is not mandatory under the provisions of Section 7(2) of the substantive provisions of the act, the limitation under the Rules which is triggered upon the filing of the application under Rule 7 can obviously not defeat the claim of the employee.

12. In the present case, upon the resignation of the Petitioner on 17th September 1995 which was accepted sometime in December 1995, it was the bounden obligation of the Respondent- employer to quantify and pay the gratuity. On 17th August 1997, the employer wrote to the Petitioner declining to do so on the ground that the gratuity had been adjusted against a loss which the Bank unilaterally determined without holding disciplinary proceedings. The correctness of the adjustment will fall for determination in the final part of this order. In so far as the question of limitation is concerned, the employee was justified in taking the position that the failure to pay his gratuity was a continuing and recurring cause of action and that there

was no delay on his part. The Appellate Authority ought not to have adopted such a hyper technical approach in the matter but ought to have furnished an opportunity to the employee even at that stage of explaining the delay, if it felt that there was any, in lodging his claim. If the employee was right that the breach on the part of the employer gave rise to a continuing cause of action, there was indeed no delay and this, in my opinion, was the correct approach to adopt. The entire approach of the Appellate Authority is perverse.

13. The final reason which has weighed with the Appellate Authority is that the employer had furnished a notice to the Petitioner quantifying the loss which had been suffered and if the Petitioner had any reasons to challenge the decision, he ought to have done so before the appropriate authority. The Appellate Authority has in my view, lost sight of the provisions of Section 4(6) of the Act. Section 4 (1) mandates that gratuity shall be payable to an employee on the termination of his employment after rendering continuous service for not less than five years, upon superannuation, retirement, resignation,

death or disablement. Sub-section (6) of Section 4 then lays down as follows :

"(6) Notwithstanding anything contained in sub-section (i),-

(a) the gratuity of an employee, whose services have been terminated for any act, willful omission or negligence causing any damage or loss to, or destruction of, property belonging to the employer, shall be forfeited to the extent of the damage or loss so caused.

(b) the gratuity payable to an employee may be wholly or partially forfeited.

(i) if the services of such employee have been terminated for his riotous or disorderly conduct or any other act of violence on his part; or

(ii) if the services of such employee have been terminated for any act which constitutes an offense involving moral turpitude, provided that such offense is committed by him in

the course of his employment." (emphasis supplied).

Ex-facie clause (a) of sub-section (6) contemplates a forfeiture of gratuity *where the services of the employee have been terminated for* any act, willful omission or negligence causing any damage or loss to, or destruction of, property belonging to the employer. Clause (b) of sub-section (6) refers to a situation where the services of the employee have been terminated for riotous or disorderly conduct or any other act of violence or any act which constitutes an offence involving moral turpitude. None of these conditions are attracted in the present case. The Petitioner admittedly resigned from service and his resignation was accepted by the Bank. His services were never terminated for any act of misconduct causing damage or loss to the employer; for riotous or disorderly conduct or for any offence involving moral turpitude. In **Bombay Gas Public Ltd. Co. Vs. Papa Akbar**, 1990 I LLJ 220, Mrs.Justice Sujata Manohar (as the Learned Judge then was), speaking for this Court held that the provisions of Section 4 (6)(a) do not come into operation unless there is a termination on the

grounds set out in that sub-section. The statutory provision for forfeiture of gratuity, the Learned Judge held, must be construed strictly and in the absence of grounds stipulated in Section 4(6), the employer is not entitled to forfeit gratuity. This decision was followed in **Air India vs. Appellate Authority,** (1999) II LLJ 93 by a Single Judge of this Court. In **Dunlop India Limited v. Union of India**, 2003 III LLJ 1125, Mukul Mudgal, J. speaking for the Delhi High Court held that where the services of an employee have not been terminated on one of the grounds set out in Section 4(6), but the employee has resigned, the provisions for forfeiture would not be attracted. In **Management of Bharat Motors N.R. Pvt. Ltd. vs. Presiding Officer, Labour Court, Tirunelveli,** 1998 I LLJ 907, a Learned Single Judge of the Madras High Court held that there must be evidence regarding the quantum of loss or damage caused failing which the management could not deny the claim for gratuity.

14. Counsel appearing on behalf of the Respondent sought to submit that independent of the provisions of Section 4(6), gratuity

could be forfeited. The submission cannot be countenanced. The mandate of Section 4(1) is an absolute obligation on the employer to pay the gratuity and this is amplified by the provisions of Section 7(2). Section 4(6) is a non-obstante provision under which a provision for forfeiture of gratuity has been enacted in specific and defined situations. Save and except in cases which fall under sub-section 4 (6) and to the extent laid down therein, the employer cannot retain a vague and uncharted discretion to forfeit gratuity. If the employer were permitted to do so, the Act would be rendered nugatory. No such right can be countenanced in the face of the clear provisions of Section 4(6) which define and limit the provisions for forfeiture. Unless a case is made out under Section 4(6), the entitlement under Section 4(1) is not overridden.

15. In **Som Prakash Rekhi vs. Union of India,** 1981 I LLJ 79, the principle was formulated by the Supreme Court in the following terms :

> "The public policy behind the provisions of Ss. 10, 12 and

> 14 of the respective statutes is clear. We live in a welfare State, in a "socialist" republic, under a Constitution with profound concern for the weaker classes including workers (Part IV) welfare benefits such as pensions, payment of provident fund and gratuity are in fulfillment of the Directive Principles. The payment of gratuity or provident fund should not occasion any deduction from the pension as a "set-off". Otherwise, the solemn statutory provisions ensuring provident fund and gratuity become illusory."

The linkage between forfeiture of gratuity and a termination of service for misconduct involving financial loss to the employer and then to the extent of loss was recognised by the Supreme Court in **Calcutta Insurance Company vs. Workmen** (AIR 1967 S.C. 1286 at pages 13 and 17). This was a case in industrial adjudication, under Section 10 of the Industrial Disputes Act, 1947. The Payment of Gratuity Act, 1972 has come into force thereafter. For all these reasons, there is no merit in the contention of the Respondent.

16. For these reasons, in my view, the Petitioner is entitled to succeed. The impugned order of the Appellate Authority dated 20th September 2004 is quashed and set aside. The Respondent is directed to pay the gratuity dues of the Petitioner within a period of four weeks from today with interest as prescribed by Section 7(3A) of the Payment of Gratuity Act, 1972. The Petition shall accordingly stand allowed in these terms. The Respondent shall pay costs to the Petitioner quantified at Rs.5,000/-.

.....